

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

ITANAGAR BENCH

W.P.(c)196(AP)2017

M/s Kenge Construction Co.

A proprietorship Firm, is represented by its Proprietor-cum-Class-IA Contractor, Shri Ha Tatu, Son of Late Ha Tama, Papu Nallah, Naharlagun, Papum Pare District, Arunachal Pradesh.

.... Petitioner

-Versus-

1. State of Arunachal Pradesh through the Secretary, Rural Works Department, Government of Arunachal Pradesh, Itanagar.
2. The Chief Engineer(Western Zone), Rural Works Department, Government of Arunachal Pradesh, Itanagar.
3. The Chief Executive Officer, Arunachal Rural Road Development Agency, Rural Works Department, Government of Arunachal Pradesh, Itanagar.
4. The Tender Evaluation Committee(TEC) for evaluation of Bids pertaining to construction of roads from Parsi-Parlo CO Hq to Damin (Stage-I) under Package No. AR/14/02/007, represented by its Chairman, Superintending Engineer, Rural Works Circle, Itanagar.
5. M/s TTC Infra India, Main Market, Bomdila, West Kameng District, Arunachal Pradesh.

..... Respondents

By Advocates:

For the petitioner

: Mr. Tony Pertin
Mr. H. K. Jamoh
Mr. Mingkong Pertin
Mr. Uttam Bori
Mr. G. Talloh

For the respondents

: Mr. Subu Tapin, Senior G.A.

Mr. Gimi Tarak
Mr. T. Garam
Mr. S. Tada
Mr. L. Asha

:::BEFORE:::
HON'BLE MR. JUSTICE AJIT BORTHAKUR

Date of hearing : 27.04.2017

Date of Judgment: 27.04.2017

JUDGMENT & ORDER(ORAL)

Heard Mr. Tony Pertin, learned counsel for the petitioner. Also heard Mr. Subu Tapin, learned Senior Government Advocate, for State Respondents No. 1 to 4; as well as Mr. Gimi Tarak, learned counsel for private Respondent No. 5.

2. By filing the petition under Article 226 of the Constitution of India, the petitioner has challenged the legality and validity of the Minutes of technical bid opening dated 17.02.2017 of the Tender Evaluation Committee(for short 'TEC') declaring the technical bid of Respondent No. 5 as responsive in respect of contract work, namely, construction of road from Parsi-Parlo Circle Officer HQ to Damin(Stage-I) under Package No. AR/14/02/007 in favour of Respondent No. 5.

The writ petitioner has also challenged the legality and validity of:- (i) Chief Executive Officer's letter dated 31.03.2017 directing the Executive Engineer & DPIU-I to issue formal letter of acceptance to Respondent No. 5; (ii) Executive Engineer's letter dated 03.04.2017 allowing the private Respondent No. 5 to proceed with the work; and (iii) Order dated 17.04.2017 passed by the Secretary, Rural Works Department, Government of Arunachal Pradesh, Itanagar, which is not in terms of this Court's directions as contained in order dated 04.04.2017 passed in WP(c)172(AP)2017.

3. The facts of the petitioner, in brief, is that, the petitioner M/s Kenge Construction Co. is a registered Class-IA Contractor, enlisted with the Chief Engineer(Design and Planning), PWD, Arunachal Pradesh, under the provisions of the Arunachal Pradesh Enlistment of Contractors in Works Departments Rules, 2008, being Reg. No. CEAP(D&P), Plg-48/2008-09/I/74 pursuant to the Office Order dated 11.12.2008 issued by the Chief Engineer(D & P), PWD, Government of Arunachal Pradesh, Itanagar.

4. The Executive Engineer/DPIU, RWD, Laaying Yangte, Kurung Kumey District, vide Notice Inviting Tender(NIT), dated 20.01.2017, invited bids through e-tendering system for construction of road under Pradhan Mantri Gramin Sadak Yojana(PMGSY) from Parsi-Parlo CO HQ to Damin (Stage-I) under Package No.AR/14/02/007, from eligible and approved contractors registered with the CPWD/PWD/BRO and Public Sector Enterprises. The estimated cost of the Project was Rs. 4279.58 Lakhs and the last date of submission of bids was fixed on 06.02.2017. The dates of opening of technical bids and financial bids were fixed on 07.02.2017 and 15.02.2017, respectively.

Pursuant thereto, 7(seven) Firms submitted their bids. The technical bid evaluation of these Firms was done by the Technical Tender Evaluation Committee on 07.02.2017 and the technical bid of 4(four) Firms were found responsive. Thereafter, the Technical Bid documents of all the firms were made available in the web portal for information of all the intending bidders. Accordingly, the petitioner downloaded the bid documents of private respondent no. 5 and upon perusal of the same, found that there were major and serious defects.

5. Mr. Pertin, learned counsel for the petitioner, contends that, amongst others, the respondent No.5 had not submitted bid validity as required under clause 15.1 of section 2 of the Instruction to Bidders(for short 'ITB') of the Standard Bidding Document(for short 'SBD') and such non-submission of essential documents should have rendered the bid of respondent No.5, non-responsive. The said respondent No.5 neither complied with the requirements of Clause 4 of the ITB as well as section 3 of the SBD nor submitted any existing commitments and ongoing construction works in the required format, which, itself, is a major defect for declaring the bid as non-responsive. That apart, the respondent No. 5 did not even furnish Labour License Certificate and also failed to furnish information of the bid capacity. According to Mr. Pertin, all these defects are major in nature as provided under the various provisions of SBD which should entail the bid of private respondent no. 5, non-responsive.

Being aggrieved, as per Clause 22.6 of Section 2 of the ITB, the petitioner had submitted complaints against the private Respondent No. 5, on 08.02.2017 and 14.02.2017, before the Superintending Engineer, Rural Works Circle, Itanagar, he being the Chairman of the TEC. However, the said complaints which were statutory in nature, were not considered by the authority for reasons best known to them.

6. Mr. Pertin, learned counsel, further contends that perusal of the "Check List for Evaluation of Technical Bid under Clause 12.1 of ITB" in respect of private respondent no. 5 reveals that the TEC found major discrepancies to the extent that the private respondent no. 5 failed to furnish:- (i) Labour License Certificate, (ii) Information of Bid Capacity and (iii) Existing Commitments and ongoing construction works in following formats. Despite such critical observations of the Committee, the bid of the respondent no. 5 was illegally accepted.

7. Mr. Pertin, learned counsel, also contends that as per the mandatory eligibility criteria laid down in the SBD, under Clause 4.4A(b), the bidder must have satisfactorily performed at least one similar nature of work equal in value to one-third of the estimated cost put to tender or such higher amount as may be specified in the Appendix to ITB. But the Appendix to ITB did not specify any such amount in the instant case. However, the respondent No.5 in order to show its eligibility of having performed one similar nature of work, submitted the following documents i.e. (i) work completion certificate No. RWD/WK/PMGSY-X/AGREE-02/2013-14 dated 21.01.2017 issued by the EE, RWD, Singchung Division, West Kameng, Arunachal Pradesh, for c/o Road from Thrizino to Palatari, Stage-I, for total value of Rs. 2811.64/- and (ii) work completion certificate No. EE/T/CS/SR/11 dated 28.07.2015 issued by the EE, PWD (Roads), Sonitpur State Road Division, Tezpur, Assam for improvement/construction of Road Belsiri T.E. connecting NH-52 including RCC Bridge No. 2/1 over river Belsiri, for total value of Rs.17,32,14,000.00/-. But the Respondent No. 5 did not comply with Section 3 of the SBD which mandates that all bidders must provide qualification information in the prescribed format, i.e. Chart showing the credentials of the bidder with descriptions.

8. Mr. Pertin, learned counsel, submits that against the RTI application filed by one Shri Kahfa Bengia, on 03.03.2017, before the EE, PWD (Roads), Sonitpur State Road Division, Tezpur, Assam enclosing therewith the work completion certificate dated 28.07.2015 issued to respondent No.5, the said EE, PWD (Roads), Sonitpur State Road Division, Tezpur, vide his letter dated 04.03.2017, confirmed that the construction certificate, in question, is not genuine and was not issued from the office of the EE, PWD, Sonitpur State Road division, Tezpur.

9. Mr. Pertin, learned counsel, further submits that as per the mandatory eligibility criteria laid down in the SBD, under Clause-4.4B(a) & (b) and clause 4.4.B(b)(i) of Appendix to ITB, the bidder must produce original RC book, purchase invoice, sale deed, up to date insurance premium paid, receipt in support of owning road construction machineries, etc.. In order to show its eligibility, the respondent No.5 submitted 3 certificates issued by the District Transport Officer, Yupia, in its name, bearing registration Nos. AR-01G-0688(Tipper), AR-01G-0788(Tipper) and AR-01G-0888(Tipper). In response to the RTI application submitted by one of the responsive Firms viz. M/s Anupam Nirman Pvt. Ltd., the District Transport Officer, Yupia vide his letter dated 28.03.2017 had confirmed that the aforesaid 3(three) registration certificates are found to be false/illegal and signatures of the registering authority have been forged. Consequently, such forgery act was communicated to the concerned authorities and also a complaint dated 21.03.2017 was lodged before the Itanagar Police Station against respondent No.5 which has been registered as Itanagar P.S. case no. 73/2017 under section 468/471/420 IPC. As nothing was done on the said complaint, another complaint was submitted on 27.03.2017 before the Superintendent of Police, Itanagar Capital Complex, which is pending disposal. Mr. Pertin, further submits that when the respondent authorities proceeded further with the tender process despite palpable technical defects and perceived frauds done by respondent No. 5, the petitioner submitted representations on 22.03.2017 and 24.03.2017 before respondents No. 3 and 4 respectively.

10. Situated thus, the said Firm i.e. M/s Anupam Nirman Pvt. Ltd., had submitted a representation on 30.03.2017 to the Minister, RWD, Arunachal Pradesh, drawing his attention to the submission of fake documents by respondent No.5 and urged for proper action against such illegal acts. However, inspite of the aforementioned complaints and representations, the TEC by its Minutes dated 01.03.2017 had opened the financial bid and found the bid of private respondent No.5 responsive.

11. It is the case of the petitioner that the TEC totally ignored Clause-4.7 of the SBD wherein it has been clearly stipulated that, "***even though the bidders meet the qualified criteria, they are subject to be disqualified if they have made misleading or false representations in the forms, statements, affidavits and attachments submitted in proof of the qualification requirement.***" Apparently, the respondent authorities for some extraneous consideration, have overlooked the fraud committed by respondent No.5 and have given way to the mandatory eligibility criteria in respect of the said respondent. Being aggrieved, the present petitioner had filed WP(c) 172(AP)2017 which was disposed of by this Court, on 04.04.2017, by directing the respondent authorities, more particularly, the respondent Nos. 1, 2 & 3, to dispose of the petitioner's representations dated 08.02.2017, 14.02.2017, 22.03.2017 and 24.03.2017, respectively, by a speaking and reasoned order, in accordance with law, within a period of 10(ten) days from the date of the order. The certified copy of the same was submitted to the authorities concerned and the matter was processed through File No. SRWD-01/W/2017-18. While the matter rested thus, the petitioner, through RTI, obtained the copy of Note Sheets and other documents as regards the tender, in question. It appears from the Note Sheets/documents that upon consideration of the matter as well as the records, the Under Secretary, RWD, Itanagar, in the presence of SE-cum-Chairman and EE-cum-Member Secretary, had noted that the Board has found discrepancies against Respondent No. 5 and there were several inconsistencies and non-responsiveness in the tender bid documents of the said respondent. Accordingly, a draft order was prepared for approval of respondent no. 1 with the findings that private respondent No.5 was non-responsive under various sections and clauses of the ITB.

12. However, by resorting to total non-application of his mind, the respondent No.1 viz. Secretary, Rural Works Department, Government of Arunachal Pradesh, Itanagar, on the contrary, without any reason or ground, had observed in the Note Sheet, that :- ***"I defer with the views offered by the Under Secretary. In fact, I interacted with the SE cum Chairman and Executive Engineer cum Member Secretary of the Tender Evaluation Board after summoning both I ask for all original documents which were with the custody of the EE cum Member Secretary So, after thorough examination and comparison of all documents of all firms including tender process, I have come to the conclusion that there is no procedural lapse on the part of deptt and there is no scope of apprehension of illegality, violation of the provision as provided in SBD. Hence, the bid document of M/s TTC Infra India found as consistent and responsive. The copies of the speaking order to all concern has been issued from this office through the PS to Secy, RWD. The file is returned here with the speaking order for record."***

According to Mr. Pertin, it is, therefore, clear that respondent no 1 had taken the decision singly and the entire decision making process adopted by him was wholly whimsical, arbitrary, discriminatory and unreasonable.

13. Mr. Pertin, learned counsel, submits that Respondent No. 1, after examination/comparison of all documents/records, found that there was no procedural lapse on the part of the Department and that there was no scope of apprehension of illegality and violation of the provisions of SBD and hence, the bid documents of M/s TTC Infra India(Respondent No. 5) was found to be consistent and responsive. According to Mr. Pertin, the reason assigned by respondent No. 1 in the Note Sheet does not justify the grounds for taking the contrary view as against the observations initially made by the bid evaluation board. It is submitted by the learned counsel that when there are two contrary views, the matter ought to have been examined further. Thus, respondent No.1 had passed the impugned order disposing of the petitioner's representations in a very mechanical and whimsical manner and without application of judicial mind, in the most arbitrary manner only to favour Respondent No. 5 on extraneous consideration.

14. According to Mr. Pertin, learned counsel, the observation of respondent No.1, in his impugned speaking order, dated 17.04.2017, to the effect that the SE-cum-Chairman and EE-cum-Member Secretary could not produce the original copies of the representations/complaints and the Member Secretary had no knowledge about the representations till signing of the agreement dated 03.04.2017 and hence, the issues could not be discussed and the Member Secretary was kept in darkness; is full of falsehood, as all the representations submitted by the petitioner on 08.02.2017, 14.02.2017, 22.03.2017 and 24.03.2017 were already a part of the official records, as has been revealed to the petitioner through RTI and as such, it is incorrect to say that the SE-cum-Chairman and EE-cum-Member Secretary could not produce the original copies of the representations/complaints and the Member Secretary had no knowledge about the same. Strangely enough, the aforesaid grounds are the only reasons cited by the Respondent No. 1, for not considering the aforesaid representations.

15. Mr. Pertin, learned counsel, submits that when the non-responsiveness of respondent No.5 is writ large on the face of the records, the respondent No.1 could not have hold the bid documents of Respondent No. 5 to be responsive. The discrepancies that were found against private Respondent No. 5 as depicted in the Check-List, are major deficiencies/ gross mistakes and not the minor deficiencies as the respondent No.1 has made to believe in his speaking order.

16. According to Mr. Pertin, learned counsel, private respondent No.5 is the younger brother of local MLA who is also the Parliamentary Secretary(Home), Arunachal Pradesh, Itanagar. Surprisingly, the said respondent No.1, in the next paragraph of his impugned speaking order, has observed that he had verified the documents pertaining to the complaints of M/s. Kenge Construction i.e. the petitioner, which indicate that the said representations were already under the domain of the respondents and were produced by the SE-cum-Chairman and EE-cum-Member Secretary.

17. Mr. Pertin, learned counsel, also submits that the respondent No.1 in his impugned speaking order, has relied upon the undertakings of bid validity in respect of Respondent No. 5 which, however, neither contained the date nor the name of work, in contravention of the provisions of the NIT.

18. It is the contention of Mr. Pertin, learned counsel, that besides the above representations of the petitioner, there were various representations of other firms alleging *inter alia* using of fake and forged documents/credentials by Respondent No. 5. However, the Respondent No. 1 did not discuss/consider any of the representations/ complaints at all, which smacks of nepotism and favouritism in favour of private Respondent No. 5. According to Mr. Pertin, no reasons could be gathered as to why the Respondent No. 1 in a mechanical way, not only deviated with the views and findings of the Under Secretary, RWD but also deviated from the core issue which had to be decided by the Respondent No. 1 in his impugned order.

19. Mr. Pertin, learned counsel, submits that in spite of continuous protest of the petitioner and other firms that the respondent No.5 not only produced fake documents to fulfill the necessary eligibility criteria for award of contract but also did not qualify the mandatory provisions of the ITB, the work had been awarded to Respondent No. 5.

20. Mr. Pertin, learned counsel, therefore submits that right from the initial stage, the acceptance of the bid documents of the Respondent No. 5 is illegal and when the entire bid document of the private respondent is non-responsive and acceptance is illegal, the other process that have occurred due to illegal acceptance of the bid documents of Respondent No. 5, are illegal and ab-initio void. Hence, the subsequent events/developments may be declared as illegal.

21. According to Mr. Pertin, learned counsel, the State largesse are to be distributed in a fair manner and not by manipulation and not be adopting illegal means and/or favouritism. Mr. Pertin, has also drawn the attention of this Court by placing a letter dated 25.04.2017 furnished by Sri Sangha Tagik, ZPM of Parsi Parlo

and Zilla Parishad Chairperson(ZPC) of Kurung Kumey District, to indicate that ***actual physical work of construction of road under PMGSY from Parsi-Parlo CO Hq to Damin(Stage-i) under Package No. AR/14/02/007 is yet to start on the ground by any person/authority as on 25.04.2017.*** Learned counsel, therefore, submits that balance of convenience is in favour of the petitioner for granting interim relief else he would suffer irreparable loss. As such, the petitioner has approached this Court for appropriate relief and also for appropriate *interim* order in the attending facts and circumstances of the case.

22. In support of his contentions, Mr. Pertin, learned counsel, has relied upon the decisions of the Apex Court as rendered in the cases of :- (i) ***R. D. Shetty v. International Airport Authority of India & ors.***, reported in ***(1979) 3 SCC 489*** (ii) ***Food Corporation of India v. Kamdhenu Cattle Feed Industries*** reported in ***(1993) 1 SCC 71***, and (iii) ***Seimens Ltd. Vs. Delhi Metro Rail Corporation Ltd.*** reported in ***(2014) 11 SCC 288.***

23. Per contra, Mr. Tapin, learned Senior Government Advocate, submits that no illegality has been committed by the authorities concerned in the tendering process and the representations of the petitioners, has been disposed of by the Respondent No. 1 by a reasoned order. Be that as it may, the learned Senior Government Advocate submits that in the peculiar facts and circumstances of the case, the matter may be remanded back to the authorities concerned for a fresh speaking and reasoned order on the petitioner's representations, within a stipulated time period.

24. Mr. Tarak, learned counsel for Respondent No. 5, on the other hand, basically submits that as the petitioner was not eligible to participate in the bidding process of the NIT, in question, therefore, he has levelled various allegations including fake registration certificates/fake work completion certificate, etc., against the Respondent No. 5 who had already signed the Agreement on 03.04.2017 with the Department concerned. He also submits that no irregularities have been committed by the authorities concerned as regards awarding of tender work to the private respondent No. 5.

25. Upon considering the matter in its entirety and taking into account the rival submissions and the documents that have been made available before this Court, it appears that the impugned order dated 17.04.2017 passed by respondent No. 1 viz. Secretary, RWD, Itanagar, has not been passed:- (i) in accordance with law as was specifically directed by this Court's order, dated 04.04.2017, and (ii) as per the given facts and circumstances of the case, at hand, and as such, the same is liable to be set aside and quashed. Hence the order, dated 17.04.2017, is hereby set aside and quashed.

26. Accordingly, in the interest of justice, since it appears that there is an element of arbitrariness in the decision making process, therefore, the matter is remanded back to the **Respondent No. 2** viz. the **Chief Engineer**(Western Zone), RWD, Government of Arunachal Pradesh, Itanagar; **Respondent No. 3** viz. **Chief Executive Officer, ARRDA**, RWD, Government of Arunachal Pradesh, Itanagar, and **Respondent No. 4** viz. **Superintending Engineer**, Rural Works Circle, Itanagar, who is the **Chairman** of the **Tender Evaluation committee(TEC)**, for examination of the entire matter, afresh, in a fair and transparent manner and arrive at a definite finding as regards the allegations levelled against the private Respondent No. 5 i.e. M/s TTC Infra India, Main Market, Bomdila, West Kameng District, Arunachal Pradesh, and thereafter, decide the issue, strictly, in accordance with law, within a period of 20(twenty) days from the date of receipt of requisite certified copies of this order, which shall be furnished by the instant petitioner to the State Respondents, above-mentioned, along with a copy of this writ petition; within a period of 1(one) week, from today.

27. With the above direction, this writ petition stands disposed of at the motion stage itself.

JUDGE

Bikash